



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 5, 1998

The Honorable Senfronia Thompson
Chair, Committee on Judicial Affairs
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 98-045

Re: Whether a private, nonprofit organization may
administer scholarship monies to minority
students (RQ-1122)

Dear Representative Thompson:

In light of the decision of the Fifth Circuit Court of Appeals in the *Hopwood* case,¹ you ask whether "a private, non-profit organization can administer scholarship monies to minority students in universities in Texas." You also ask us to address how "*Hopwood* affects the role of universities in providing resources to these non-profit organizations." You are particularly interested in whether a university may provide names of minority students to a private, nonprofit organization or may establish "a referral system at the university for minority students [who wish] to receive monies from the fund."

In *Hopwood*, the Fifth Circuit concluded that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution requires a state university to meet a certain burden of proof to justify the use of racial classifications in admissions.² The Fourteenth Amendment, however, applies only to "state action" and does not apply to purely private conduct.³ "Careful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law' and avoids the imposition of responsibility on a State for conduct it could not control."⁴ The conduct of a private party rises to the level of state action only in the rare case,⁵

¹*Hopwood v. State*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

²*See id.* at 941-55.

³"As a general matter the protections of the Fourteenth Amendment do not extend to 'private conduct abridging individual rights.'" *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988) (citing *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961)).

⁴*Id.* (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)).

⁵"In the typical case raising a state-action issue, a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as
(continued...)"

generally when “the conduct allegedly causing the deprivation of a federal right [can] be fairly attributable to the State.”⁶ Given that the Fourteenth Amendment does not extend to private conduct, we do not believe that the *Hopwood* decision generally affects the authority of a private, nonprofit organization to administer a privately funded, race-restricted scholarship program.

As this office has noted, the line between purely private conduct and state action is not always an easy one to draw.⁷ The determination whether challenged conduct constitutes state action “requires a fact-intensive inquiry” that is beyond the scope of an attorney general opinion.⁸ For this reason, we cannot definitively resolve whether a state university’s involvement in the scholarship program of a particular private, nonprofit organization transforms the organization’s private activities into “state action.” We believe, however, that a state university may provide to a private, nonprofit organization any student information that the university would generally provide to any other member of the public and would not thereby transform the organization’s private activities into state action.⁹ Furthermore, we do not believe that a private, nonprofit organization’s scholarship program would rise to the level of state action merely because a state university provides students with information about the scholarship program.

In sum, the *Hopwood* decision does not affect the authority of a private, nonprofit organization to administer a privately funded, race-restricted scholarship program. A state university may provide information about students to such an organization and may inform students about the organization’s scholarship program without transforming the organization’s private activities into state action.

⁵(...continued)

state action. This may occur if the State creates the legal framework governing the conduct . . . ; if it delegates its authority to the private actor . . . ; or sometimes if it knowingly accepts the benefits derived from unconstitutional behavior. . . . Thus, in the usual case we ask whether the State provided a mantle of authority that enhanced the power of the harm-causing individual actor.” *Id.* at 192 (citations omitted). In determining whether private action constitutes state action, courts typically examine whether the private entity has exercised powers that are traditionally the exclusive prerogative of the state; whether the state exercised coercive power; and whether there is a sufficient nexus between the state and the challenged private action that the private action may be treated as the action of the state. *See Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982).

⁶*Tarkanian*, 488 U.S. at 199 (citing *Lugar*, 457 U.S. at 937).

⁷Letter Opinion No. 97-001 (1997) at 20-22.

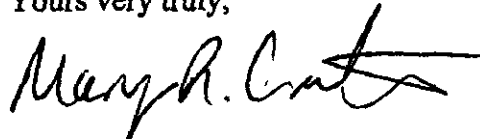
⁸*Id.* at 21-22.

⁹This office has stated that *Hopwood* does not affect a state university’s “ability to collect and report information . . . regarding minority participation in higher education in Texas. The act of collecting data does not confer a benefit or a burden on any one race.” *Id.* at 23. Before releasing any student information, a state university should consult state and federal statutes governing access to student records. *See, e.g.*, 20 U.S.C. § 1232g (federal Family Educational Rights and Privacy Act of 1974); Gov’t Code §§ 552.026, .114 (Texas Open Records Act).

S U M M A R Y

The *Hopwood* decision does not affect the authority of a private, nonprofit organization to administer a privately funded, race-restricted scholarship program. A state university may provide information about students to such an organization and may inform students about the organization's scholarship program without transforming the organization's private activities into state action.

Yours very truly,

A handwritten signature in black ink, appearing to read "Mary R. Crouter", with a stylized flourish at the end.

Mary R. Crouter
Assistant Attorney General
Opinion Committee